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No. 87-442

In The

Supreme Court of the United States

October Term, 1987

PENNSYLVANIA DRILLING COMPANY, INC.,

Petitioner,

v.

WILLIAM SORBA,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether Claimant presented evidence which if believed raised a genuine issue as to a material fact, namely, pretext, so as to defeat summary judgment.

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COUNTERSTATEMENT OF THE CASE

On April 8, 1983, after twenty-seven (27) years of employment as a driller with Pennsylvania Drilling Company (hereinafter "Employer"), William Sorba (hereinafter "Sorba") was discharged at the age of 54. Sorba brought suit in District Court alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Section 621 *et seq.*, contending that age was a factor in the Employer's decision to discharge him. A-3.[1]

The decision to discharge Sorba was made by Tom Sturges, President of the Employer. Sturges asserted that this decision was based on information he had received to the effect that Sorba had performed poorly on his last three jobs, had padded jobs, accrued unnecessary overtime, caused morale problems by criticizing Employer and had refused on occasion to take direct orders, *i.e.*, was insubordinate. A-7. Of course, Sorba challenged these explanations by presenting specific testimony and evidence regarding the factual underpinnings of Employer's allegations. For example, Sorba gave his personal explanation for the poor results produced by the jobs which included reference to equipment malfunctions, soil conditions, weather and the like. A-9.

More importantly, however, Sorba conducted extensive discovery of Employer to ascertain the validity, accuracy and sincerity of the numerous reasons for discharge proffered by Employer. The deposition of Sturges was taken at which time he testified that while he was not personally familiar with Sorba's performance, he had based his de-

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[1]References are to Appendix in Employer's Petition.

cision to discharge Sorba on information received from Jack Woleslagle, Vice President and Manager of Division 1 of Employer, and Jim Dravenstott, Sorba's immediate supervisor. Their depositions were then taken. A-8.

Dravenstott testified that the Emsworth Dam job went as well as could be expected. As to Sorba's alleged poor work performance, he candidly admitted that he could not ascribe the problems with the job to Sorba. A-8. As to the Hussey Metals job, Dravenstott admitted that he really had no problem with Sorba's performance; he thought the job was going as well as he wanted. He candidly admitted that he did not know whether it could go better or not. A-8. As to Sorba's alleged detrimental influence on morale, Dravenstott indicated that his observations were based on "hearsay" and "rumors". A-8. Finally, he indicated that he could not state for sure that Employer lost money because of Sorba's performance. A-8.

Woleslagle, another management representative who Sturges indicated had been the source of information leading to Sorba's discharge, stated that he had "no problems" with Sorba. A-8. He specifically confirmed Sorba's rendition of problems encountered with the Emsworth Dam project stating that steel had been encountered in the drill hole and that there were problems at the bottom of the shaft with a large void. A-9. He stated that he was unaware that Sorba had created morale problems or criticized the company. Like Dravenstott, Woleslagle was unable to confirm that the company had lost any money due to Sorba's alleged poor work performance on any job. A-9.

At the point in time when Employer filed its Motion for Summary Judgment, it was undisputed that Sorba was

able to introduce evidence to support a *prima facie* case of age discrimination under the ADEA. A-7. Employer then proffered facially legitimate reasons for discharging him. To resist this, Sorba not only presented his own personal rendition of the facts and circumstances countering employer's proffered explanations for discharge, but presented detailed testimony from the President, Vice President and Sorba's immediate supervisor, which specifically *contradicted* and *undermined* Employer's proffered reasons for discharge. A-8, 9 and 10.

The District Court granted Employer's Motion for Summary Judgment. The Third Circuit found that once a *prima facie* showing of discrimination was made out, and an employer had posited legitimate reasons for discharge, all a claimant must do to survive Summary Judgment is present evidence raising a genuine issue as to a material fact. Absent direct evidence of age discrimination, a claimant could present evidence establishing that the employer's proffered reasons for discharge were a pretext, *i.e.*, that employer's proffered explanation is unworthy of credence. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir. 1987). The Court found, in effect, that the Employer's own evidence and testimony, aside from Sorba's personal rendition of the facts, clearly contradicted and undermined its reasons for discharge thereby raising a fact question as to this material issue. The Third Circuit therefore reversed the lower court's entry of Summary Judgment. Employer's Petition for Writ of Certiorari followed.

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SUMMARY OF ARGUMENT

The basic analysis followed by each of the Circuit Court's cited by Employer was the same and was fully in accordance with the clearly enunciated position of the Supreme Court of the United States. Employer is attempting to create a legal issue where none exists. A careful analysis of the Circuit Court decisions cited indicates that, while the facts of each case differed, the legal analysis employed in each was similar and consistent with the analysis followed by the Third Circuit. A factual analysis of a claimant's evidence is compelled where grant of summary judgment is reviewed. Employer misreads *Furnco, infra.* The Third Circuit followed *Furnco.*

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ARGUMENT

Employer has reviewed existing case law in the Circuits in an attempt to construct a legal issue to secure review of the adverse decision of the Third Circuit in the instant case. Employer contends that the First, Second, Sixth, Seventh and Eighth Circuits have held that the factual basis of the employer's reasons for discharge is not an issue in an age discrimination case. This, the Employer contends, is in conflict with the approach taken by the Third Circuit, along with the Fifth Circuit, which permits an analysis of the factual basis of the Employer's reasons for discharge. The Ninth Circuit, the Employer contends, has stated an approach which permits consideration of the factual basis, but only to determine if suf-

ficient evidence exists to establish a legitimate concern of the employer. Employer's Petition, p. 6.

The Employer argues that the Third Circuit's analysis requires a court to sit as a "super-personnel department" that re-examines Employer's business decisions. *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir. 1986) *cert. denied,* — U.S. —, 107 S. Ct. 954 (1987). The Employer contends that the Third Circuit's standard, which authorizes judicial inquiry into the factual basis of the employer's legitimate business reasons, also conflicts with this Court's decision in *Furnco Construction Corporation v. Waters,* 438 U.S. 567 (1978), since Sorba allegedly failed to refute "all" legitimate reasons proffered by the Employer for his discharge. In support of this contention, Employer relies on Sorba's subjective rendition of the facts, but totally ignores, once again, the damning admissions of Employer's representatives as set forth hereinabove.

This case does not present the issue of whether the ADEA is a vehicle for the general judicial review of business decisions. Nor does the case raise the issue of whether a Court may review evidence of the factual basis for discharge. This, after all, seems mandated by Rule 56(c) of the Federal Rules of Civil Procedure, which sets forth the requirement, among others, that the party against whom a summary judgment is sought must have failed to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof.

The issue, simply put, is whether Sorba has presented evidence which, if believed, raises a genuine issue as to material fact. Since direct proof of age discrimination

may not exist in the record, Sorba has predicated his case on attempting to prove that the Employer's proffered reasons for discharge are pretextual. The Third Circuit was satisfied that he met this burden not, as the Employer would have it, through his own testimony or self-serving declarations, but, rather, through the Employer's own inconsistent and contradictory explanations. The other Circuit decisions taken as a whole seem to stand for the proposition that a claimant seeking to avoid summary judgment or simply attempting to meet his or her burden of proof at trial on the merits must rely on more than his or her own subjective second guessing of admittedly valid business decisions discharging them. In the instant case, Sorba presented substantial, indeed, overwhelming evidence which, if believed, conclusively established Employer's proffered reasons as mere pretext to cloak discrimination.

Commencing its analysis, the Third Circuit recited the general requirement that a claimant, under the ADEA, must prove that age was a determinative factor in the defendant employer's decision to dismiss the employee. Of course, this may be proven by direct evidence. However, in the absence of such evidence, a claimant may establish a *prima facie* case indirectly by proving various things. The Court noted that it was admitted that Sorba was able to introduce evidence to make out a *prima facie* case of age discrimination and, therefore, the Court moved on to the next step of the analysis. Having proven a *prima facie* case, the burden of production then shifts to the defendant to articulate some legitimate non-discriminatory reason for the discharge. *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973). Upon review of this mat-

ter, the Court concluded that the Employer articulated legitimate, non-discriminatory reasons for Sorba's dismissal. Sorba was obliged, therefore, to prove by a preponderance of the evidence that the proffered reasons were but a pretext for discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Since Employer sought summary judgment, the Third Circuit cited the applicable Federal Rule of Civil Procedure, Rule 56(c), and imposed on Sorba the burden of presenting evidence which, if believed, raised a genuine issue as to a material fact. Since pretext was a material fact, it was necessary to review, *but not weigh*, the evidence to determine whether there was a general issue for trial. *Anderson v. Liberty Lobby, Inc.,* — U.S. —, 106 S. Ct. 2505, 2511 (1986). A review of the other Circuit cases discloses a similar analysis, set against different factual backdrops.

In *Dale, supra,* the Seventh Circuit recited the shifting burdens of proof required by *McDonnell Douglas, supra,* and *Burdine, supra,* and framed the issue as being whether the claimant had refuted the proffered non-discriminatory reasons for discharge. The Court held that the claimant could point to "nothing in the record, beside his own perceptions, to support his assertion that his performance was adequate." *Dale, supra,* at 464. Terming the claimant's assertions as "self-interested, conclusory assertions of discrimination" combined with "dubious statistical evidence" the Seventh Circuit concluded that claimant had not rebutted the proffered explanation for discharge. *Id.* at 465. The Court further noted that the claimant's perception of himself was irrelevant; rather,

it "is the perception of the decision maker which is relevant." *Dale, supra,* at 465, quoting from *Smith v. Flax,* 618 F.2d 1062, 1067 (4th Cir. 1980).

The case seems to stand for the proposition that a claimant in an age discrimination case simply cannot rely on his own perception of events but must challenge by other evidence the posited reasons for discharge. The focus of inquiry must be on the perception of the decision maker —his reasoning--rather than the claimant's perception since, human nature being what it is, this is bound to be biased and self-serving.

In *Dea vs. Look,* 810 F.2d 12 (1st Cir. 1987), the First Circuit held that a claimant cannot meet his burden of proving "pretext" simply by questioning the employer's articulated reasons for discharge. After "extensive" discovery the Court concluded that all claimant could present was evidence "casting doubt on the correctness" of the employer's proffered reasons for discharge. *Id.* at 15. This, as a matter of law, was insufficient to prove pretext or discriminating intent. "When faced with indicating what he would prove to show that Defendants' explanation was a mere pretext, Dea merely indicated that the reason for his firing was his own version of the controversy . . . ." *Id.* at 16. Such was insufficient to prove that the Defendants' reason was a pretext for age discrimination.

Clearly, Sorba did not rely exclusively on his own rendition of the facts. Of course, he had his own explanation for what had happened. But, unlike the claimant in *Dea,* Sorba profited from his discovery which yielded damning admissions from the Employer's representatives. The President of the company who personally fired him ad-

mitted that he had no first hand knowledge about Sorba but had relied on information provided him by his subordinates. A-7,8. Sorba then deposed these individuals. Woleslagle, a Vice President, and Dravenstott, Sorba's immediate supervisor, both testified extensively that they generally had no problem with Sorba. Neither of them had anything bad to say about Sorba and, when questioned about poor work performance, they actually verified Sorba's rendition of mitigating circumstances. Likewise, when the questioning turned to matters of whether the company had lost money on these jobs or whether he had made derogatory comments about the company, neither of these witnesses were able to confirm these allegations. A-8. It was the Employer's *own* witnesses who contradicted the reasons articulated by it for Sorba's discharge.

In *Parcinski v. Outlet Company,* 673 F.2d 34 (2nd Cir. 1982), the Second Circuit heard the appeal of an employer after a jury had rendered a favorable verdict for an age discrimination claimant. On reviewing the record, the Court concluded that the record "is utterly devoid of any proof of discriminatory motivation" on the part of the employer. *Id.* at 37. The Court specifically concluded that claimant's evidence amounted to the second guessing of corporate decisions which, while raising matters of concern to the employer, were simply not "pretextual arguments" *Ibid.* In effect, there was simply no evidence indicating that the employer in that case had made anything other than a rational business decision dictated by financial circumstances beyond its control and what it thought would be an economically wise elimination of the claimant's job. This is clearly distinguishable from the

instant case, where substantial evidence exists indicating that the Employer's reason for the discharge was anything but reasonable and rational but, rather, so clearly inconsistent and contradictory as to raise an inference of "discriminatory animus". *Ibid.*

In *Wilkins v. Eaton Corporation,* 790 F.2d 515 (6th Cir. 1986), the Sixth Circiut used the same analysis as the Third Circuit employed in the instant case. Once the employer articulated a legitimate reason for its action, the claimant was obliged to prove that the stated reason was a mere pretext or cover-up for what was in truth a discriminatory purpose. *Id.* at 521. Apparently, a pilot had refused to utilize a flight check list *mandated* by his employer because the pilot thought the same was biased towards younger pilots and, worse yet, arguably unsafe. The pilot admitted that it was a mandatory requirement and further admitted that he refused to use it. He even admitted that the employer probably thought that the flight check list was a matter of concern to the employer as to safety. The Court concluded, however, that the claimant had introduced no evidence that the employer's proffered reason was a pretext.

All of the employer's witnesses testified, without contradiction, that the pilot's outright refusal to use the checklist was the basis for his dismissal. *Id.* at 521. While noting that a fact finder may not focus on the soundness of the employer's business judgment, the Court simply found that the claimant had failed to introduce *any* evidence establishing pretext. In fact, the pilot's rendition of the events leading to his discharge actually agreed with that of the employer's witnesses. *Ibid.* "There was no evi-

dence at all that Eaton adopted this checklist as a pretext for discriminating against Wilkins; even Wilkins testified that Eaton management probably thought the checklist would increase the safety of flights." *Id.* at 522.

In *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161 (8th Cir. 1985), the Eighth Circuit was confronted by another situation where a claimant, in an attempt to prove his case, offered nothing more than his own "subjective reactions" to the decision by his employer to terminate him. *Id.* at 1168. The claimant made absolutely no showing that the employer's proffered reasons for discharge, namely a plant-wide reduction in force, was anything other than a carefully planned business decision to spread the negative impact of layoffs over all groupings of employees regardless of their race, sex and age. Simply put, the claimant's evidence "makes no showing that Sanyo's articulated reasons for discharge were pretextual." *Ibid.*

While it is true that this decision, like many of the others, contains the general proscription against examining the soundness of an employer's business judgment, it does not stand for the proposition that the Court is precluded from an analysis of the factual basis of the employer's decision. If, on examining the factual basis of the employer's proffered reasons for discharge, the Court concludes that those reasons are inaccurate or, as in the instant case, clearly contradicted by the employer itself, it can hardly be said that the reviewing Court is attempting to second guess the soundness of the employer's business judgment. The Third Circuit did not substitute its own judgment for the business judgment of the Employer in the instant case. Rather, the Court reviewed in detail the specific testimony of Employer's representatives and con-

cluded that the testimony not only contradicted its proffered reasons for discharge, but actually undermined the Employer's position and supported Sorba's position.

In *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982), the Sixth Circuit determined that the only evidence of record regarding the employer's reasons for suggesting to a claimant that he take early retirement (which the claimant voluntarily opted for) was that the employer made a legitimate business decision to eliminate claimant's position in an effort to "increase corporate efficiency." *Id.* at 70. The Court found that the claimant attempted to refute this with nothing more than "personal conclusions" that age was a factor. *Ibid.* There was simply nothing of record to support the claimant's bald assertion that age discrimination was involved except claimant's own beliefs which were far from unequivocal.

Once again, this case is clearly distinguishable from the facts confronting the Third Circuit. There was overwhelming evidence of record that the Employer's reasons for Sorba's discharge were something other than a response to an economic downturn, a desire to increase corporate efficiency, an effort to improve corporate morale, or simply disciplinary action. Rather, the propriety, legitimacy, and, indeed, the sincerity of the proffered reasons for discharge were drawn into question thereby raising a fair inference that the employer's proffered reasons were a mere pretext for discrimination.

In *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983), the Ninth Circuit recited the well-established law set forth in *McDonnell Douglas* and *Burdine*. After reasons for discharge were proffered, the claimant was re-

quired to "demonstrate that Motorola's explanation was but a pretext for discrimination." *Id.* at 393. The Employer suggests that the approach of the Ninth Circuit is at variance with the approach taken by the Third Circuit since the Ninth Circuit required "specific, substantial evidence of pretext and that age was a determining factor." *Ibid.* Noting that a claimant in an ADEA case must tender a genuine issue of material fact as to pretext in order to avoid summary judgment, the Court found that the claimant "produced no facts which, if believed, would have shown pretext and thus tendered an issue for trial." *Ibid.* Once again, a claimant's mere conclusory allegations, absent additional evidence, were insufficient to establish pretext. In the instant case, the record on appeal fairly abounds with facts which, if believed, would establish that the Employer's reasons were pretextual.

In *Leichihman v. Pickwick International,* 814 F.2d 1263 (8th Cir. 1987), the Eighth Circuit dealt with a situation where an employer, during an economic downturn, consolidated a claimant's position with that of a younger employee, and retained the younger employee. The case stands for the proposition that the ADEA does not create an "automatic presumption" of discrimination but requires that a claimant must make some additional showing that age was a determining factor. *Id.* at 1270. On review, there was absolutely no evidence that the employer's decision was anything other than a rational business move during an economic downturn.

In *Pace v. Southern Railway System,* 701 F.2d 1381 (11th Cir. 1983), *cert. denied,* 464 U.S. 1018 (1983), the Eleventh Circuit concluded that a claimant had failed to

prove a *prima facie* case of discrimination. In attempting to resist a motion for summary judgment, the Court concluded that a claimant cannot rely on "attenuated possibilities" from which a jury may infer a discriminatory motive, but must come forth with evidence to establish a *prima facie* case and then respond sufficiently to any "rebuttal" by the Defendant so as to create a genuine issue of material fact. *Id.* at 1391. The claimant apparently failed to respond at all to the employer's reason for discharge. *Id.* at 1392, note 8. Once again, this case is clearly distinguishable from the facts in the instant case.

Each of the Circuit decisions cited appear to rely on the same legal analysis. The Employer's contention that some of the Circuits have "held" that the factual basis of an employer's reasons for discharge are simply not an issue in age discrimination cases is simply not borne out by a close reading of the cases. In many of the cases, as noted above, the Court simply found that the claimant had failed to introduce sufficient evidence which, if believed, raised a question as to the Employer's reasons for discharge. Each of the cases contains a thorough review of the facts as alleged by the claimant. None of the Circuit Courts have held that the Court cannot, or should not, review the factual basis of the employer's reasons for the discharge. The Employer has simply confused the position taken by many of the Courts, that the ADEA does not authorize judicial review of business decisions, to mean that the Court is barred from reviewing the factual underpinnings of those business decisions. This is mixing apples and oranges.

Similarly, Employer's contention that the Third Circuit's decision is in conflict with some of the other Cir-

cuits, in that it fails to require a claimant to establish a "nexus" between a claimant's evidence and age discrimination, is similarly lacking in merit. As an example, in *Dale, supra,* at 465, the Court does recite the requirement that a claimant must establish a nexus between his evidence and age discrimination in that, "but for" his age, he would have not been terminated. As to how one would prove this, the Seventh Circuit noted that it was incumbent on the employee to "refute" the specific explanations for his discharge given by his employer. *Id.* at 464.

The Court found that the employee could only rely on his own deposition to rebut the criticisms of his superiors. "The question is not whether the Tribune exercised prudent business judgment, but whether Dale has come forward to refute the articulated, legitimate reasons for his discharge." *Ibid* (citation omitted). Had the employee presented evidence, aside from his own self-interested assertions, showing that the employer's explanations were unworthy of credence or mere pretext, Dale would have survived summary rejudgment. The so-called "nexus" requirement appears to be another way of stating that an employee is obliged to rebut the employer's proffered explanation for discharge with something more than self-interested, conclusory assertions of discrimination. *Id.* at 465.

Finally, the Employer suggests that the Third Circuit "standard" permits an inference of age discrimination where *some* but not *all* of the employer's legitimate reasons for discharge are allegedly in dispute. Citing *Furnco, supra* at 577, Employer contends that the Third Circuit's opinion reveals certain uncontested legitimate reasons

proffered by the employer and, therefore, states a rule at variance with this Court's decision in *Furnco*. This argument is without merit for two reasons.

First, the Employer is misreading *Furnco, supra*. The quote relied upon by Employer is part of the *rationale* of the Court easing the evidentiary burden of a claimant. *Furnco* stands for the proposition that a *prima facie* case of discrimination may be established by indirect, as well as direct, proof. Hence, where there is no smoking gun of discrimination, *i.e.*, direct evidence of age discrimination, one can prevail by establishing that the proffered reasons for discharge are pretextual since human nature dictates that business entities do not fire people for *no* reason. *Id.* at 578. In this sense, the Third Circuit strictly adhered to this Court's pronouncement. A-4, 5 and 12.

Second, however, Employer's argument assumes that Sorba failed to introduce some evidence which, if believed, contradicted the Employer's contention that poor results were generated from three jobs due to Sorba's poor work performance. Employer's Petition 10 and 11. As noted by the Third Circuit, the President of Employer candidly admitted that he was not personally familiar with Sorba's performance on these jobs. Sorba's immediate supervisor, Dravenstott, could not fault Sorba's performance as the cause for the problems with the jobs. Likewise, he could not state for sure that the company lost money because of Sorba's performance. A-8. Woleslagle, Employer's Vice-President, also stated that he was unable to confirm that the company lost money due to Sorba's performance from a job. A-9. Hence, it is improper to characterize the Employer's contention that Sorba's poor work performance

caused poor results for the company as "uncontested". Employer's Petition, 10.

The decision of the Third Circuit in the instant case does not conflict with the decisions of the other circuits and does not misapply this Court's decision in *Furnco, supra.* Each of the Circuit decisions appear to rely on the well-settled principles enunciated by this Court in *McDonnell Douglas, supra,* and *Burdine, supra,* and differ only as regards the evidence adduced by the claimant in support of his or her claim. In the instant case, Sorba presented overwhelming evidence which, if believed, could lead a jury that the employer's reasons for discharge were a mere pretext for age discrimination. It is obvious from a review of the Circuit decision cited, that many of the claimants failed to adduce such evidence. Each of the Circuits conducted a thorough review of the facts as presented by the claimants and each permitted the claimant to prove his case indirectly by establishing that the employer's reasons for discharge were pretextual. In this regard, the decisions of the Circuits are consistent.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be refused.

Respectfully submitted,

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DATED: December 10, 1987.